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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JUDY RENEE SCALES, as next Friend
of CHARLES LEWIS SCALES,
Petitioner,

V.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the judicially created exception to the Federal Tort Claims Act "for injuries to servicemen" incident to military service, first enunciated in *Feres v. United States*, 340 U.S. 135 (1950), will, for the first time, be extended to bar a medical malpractice action against the Government brought by a minor civilian for prenatal injuries he sustained that were in no way derivative of any injury to his servicewoman mother.

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Petitioner, Judy Renee Scales, as next friend of Charles Lewis Scales, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this action on September 13, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 685 F.2d 970 (5th Cir. 1982) and is reprinted as Appendix "A" to this Petition. The District Court's opinions (entered as Memorandum of Findings of Fact and Conclusions of Law and Amended Order) are unreported and are reprinted as Appendices "B" and "C". The District Court's judgment is reprinted as Appendix "D". The judgment of the Fifth Circuit and its order denying rehearing are reprinted as Appendices "E" and "F".

JURISDICTION

The Court of Appeals rendered its decision on September 13, 1982. A timely suggestion for rehearing en banc, treated also as a petition for panel rehearing, was denied on October 19, 1982, and this Petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The principal statutes involved in this case are 28 U.S.C. §1346(b) and 28 U.S.C. §2674. 28 U.S.C. §1346(b) provides:

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U.S.C. §2674 provides in relevant part:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> "****"

STATEMENT OF THE CASE

This action was brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346, 2671-2680, by Petitioner Charles Lewis Scales, an infant, through his mother, Judy Renee Scales, as his next friend. Charles alleged, and the District Court found (App. "B"), the following facts as the basis of his action against the United States:

Charles' mother was inducted into the United States Air Force on June 27, 1977, and was assigned to undergo basic training at Lackland Air Force Base (AFB) in San Antonio, Texas. Ms. Scales was unaware that she was pregnant with Charles at the time of her induction. In the latter part of June or early July, 1977, during the first trimester of this pregnancy, Ms. Scales was given a rubella[1] vaccination. Air Force personnel made no effort to determine whether Ms. Scales was pregnant before giving her the rubella shot. On July 25, 1977, Ms. Scales was hospitalized at Lackland AFB with "viral syndrome", and her symptoms were diagnosed as "probable rubella." The Air Force physicians neither informed her of this diagnosis at that time nor attempted to determine whether she was pregnant.

After the completion of her basic training at the end of August, 1977, Ms. Scales was transferred to Keesler AFB in Biloxi, Mississippi. Approximately one month later, the Air Force physicians at Keesler determined that she was approximately nineteen weeks pregnant. Those physicians did not request her medical records from Lackland AFB. She was not informed by the medical personnel at either Lackland

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[1]Rubella, or German measles, is an infectious disease which can cause, particularly during the first trimester of pregnancy, a plethora of tragic and permanent injuries to a fetus, including cataracts, hearing impairment, heart damage, and physical and mental retardation.

AFB or Keesler AFB of the possible effects of rubella on a fetus, and was never counseled about an abortion.

Ms. Scales was discharged from the Air Force in December, 1977, because of her pregnancy. On March 21, 1978, she gave birth to Charles. He was born with numerous congenital defects, including cataracts, a heart murmur, possible neurological damage, respiratory problems, growth deficiencies, and possible mental and physical retardation.

At trial, medical testimony clearly established that Charles' defects resulted from his mother's exposure to rubella early in her pregnancy. Ms. Scales testified that if she had been informed of the diagnosis of "probable rubella" and the staggering effects of rubella on an unborn child, she would have aborted the child she was carrying.

Charles' claim is therefore two-fold. First, he has a traditional negligence action[2] against the Air Force for the acts of its physicians in causing his congenital rubella syndrome, and the defects resulting therefrom, by administering the rubella shot without checking to learn of his existence in his mother's womb. Second, he has a "wrongful life" cause of action for the negligence of the physicians in failing to inform his mother of dangers posed to the fetus by the rubella or to counsel her concerning the possibility of an abortion.

The District Court concluded that the *Feres* doctrine was inapplicable in this case and entered judgment against the United States in the amount of $625,000.00, to compensate Charles for the damages he will sustain after reaching the age of 18, including the expense of the medical and custodial care he was found to require, his lost income, and the pain, suffering and mental anguish he will incur.

On appeal, the Fifth Circuit reversed the District Court's judgment, albeit "reluctantly" (685 F.2d at 974), on the ground that Charles' claim was barred by the *Feres* doctrine. From that decision, rehearing of which was denied, this petition has ensued.

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[2]Under Texas law, it is well established that a child that is born alive and survives does have a cause of action for prenatal injuries sustained at any prenatal stage. *Yandell v. Delgado*, 471 SW2d 569 (Tex. 1971).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals marks the first time since the passage of the FTCA in 1946 that a civilian's tort action against the government has been barred under the *Feres* doctrine even though no military personnel were injured. That decision marks a radical and unjustified extension of *Feres* that is unsupportable either by the rationale underlying the doctrine or by the language or purpose of the FTCA.

While differing rationales have subsequently been proffered to support the *Feres* doctrine, its essence has remained unchanged and is best stated by this Court:

> "The Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arose out of or are in the course of activity incident to service." (*Feres, supra*, 340 U.S. 146).

Two prerequisites to the application of the *Feres* doctrine have thus always been maintained, until now: (1) An injury to military personnel, and (2) an injury arising out of or caused by activity incident to military service. In this case, the first requirement is clearly not met, and the second is therefore meaningless and inapplicable. Because the requirements of *Feres* have thus not been satisfied, it is not surprising that the rationale underlying *Feres* does not fit this case.

This Court in *Feres* fashioned its exception to the FTCA based on two grounds: the distinctly federal nature of the relationship between the military and its members, and the availability of veterans' benefits to compensate servicemen for their injuries. (340 U.S. at 142-145). Subsequently, a third rationale, preserving military discipline, was cited as additional support for the *Feres* doctrine. *United States v. Brown*, 348 U.S. 110, 112 (1954).

In determining that Charles' claim was barred by *Feres*, the Court of Appeals considered two of the three factors: i.e., (1) the availability of veterans' benefits[3] and (2) the concern for preserving military discipline.[4]

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[3]685 F.2d at 972.

[4]685 F.2d at 973.

In application of the rationale of the availability of veterans' benefits, the Fifth Circuit stated:

> "A tort claim under the FTCA, such as Charles', see *Monaco, supra*, 661 F.2d at 138 [sic], could circumvent the limitation established by the act and 'judicially admit at the back door that which has been legislatively turned away at the front door'. *Id.* 431 U.S. at 673, 97 S.Ct. at 2059, quoting *Laird u Nelms*, 406 U.S. 797, 802, 92 S.Ct. 1899, 1912, 32 L.Ed. 2d 499 (1972)." (685 F.2d at 972)

This statement is simply a misapplication of the rationale of availability of veterans' benefits set forth in *Stencel Aero Engineering Corporation u United States*, 431 U.S. 666, 673.[5] In *Stencel*, the injured serviceman did receive veterans' benefits.[6] To allow Stencel's indemnity action[7] under the FTCA would have required the government to pay twice for one injury. That danger is not present in this case. Here, no member of the military was injured,[8] and no veteran's benefits have been paid as are allowable, because Charles is not covered by the VBA for his own injuries.[9] Thus, to permit

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[5]The *Stencel* Court noted that one of the essential features of the Veterans' Benefits Act (VBA) was to provide "an upper limit of liability for the Government as to service-connected injuries." 431 U.S. at 673.

[6]431 U.S. at 668.

[7]The facts of *Stencel* are these: A serviceman sustained serious injuries when the ejection system of his fighter aircraft malfunctioned during a midair emergency. He brought suit against the United States and Stencel Aero Engineering Corp., the manufacturer of the ejection system. *Id.* at 668. Because Stencel manufactured the system in accordance with government specifications and used components provided by the government, Stencel cross-claimed against the United States for indemnity. *Id.* at 667-68.

[8]Ms. Scales was not injured while she was treated by the military medical personnel.

[9]Dependents of military personnel are entitled only to death benefits under the VBA, 38 U.S.C. §§341.

Charles' action would not subject the United States to double liability, and therefore would not contravene the VBA's purpose of limiting the government's liability.[10]

In this case the Court of Appeals relied heavily on the factor of military discipline as the basic reason for invoking the *Feres* doctrine.[11] However, in medical malpractice cases, courts have not employed the military discipline factor to deny a claim by a military person, and rather, plainly relied on the military status of the claimant.[12] In *Shults v. United States*, 421 F.2d 170, the administrator of the estate of a deceased serviceman, who was injured on leave in an auto accident and taken to a military hospital, filed suit against the government under the FTCA for the death of the serviceman allegedly caused by malpractice of physicians and others in charge of the military hospital. In affirming the district court's summary judgment for the government, the Fifth Circuit held:

> "[It] is obvious that the injured man could not have been admitted, and would not have been admitted, to the Naval Hospital except for his military status. He was of that status. It inescapably follows that whatever happened to him in that hospital and during the course of that treatment had to be 'in the course of activity incident to service.' (Citation omitted)" (421 F.2d at 171-172.)

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[10]For an excellent, detailed discussion of the unwarranted application of the rationale of the availability of veterans' benefits under these circumstances, please see *The Effect of the Feres Doctrine on Tort Acts against the United States by Family Members of Service*, 50 Fordham L. Rev. 1241, at 1254-1258 (May, 1982).

[11]*685 F.2d at 973.*

[12]*Shults v. United States*, 421 F.2d 170 (5th Cir. 1969); *Lowe v. United States*, 440 F.2d 452 (5th Cir. 1971) *cert. denied* 404 U.S. 833 (1971); *Vallance v. United States*, 574 F.2d 1282 (5th Cir. 1978); *Hall v. United States*, 451 F.2d 353 (1st Cir. 1971); *Stansberry v. Middendorf*, 567 F.2d 617 (4th Cir. 1978); *Woodside v. United States*, 606 F.2d 134 (6th Cir. 1979) *cert. denied* 445 U.S. 904 (1980); *Henninger v. United States*, 473 F.2d 814 (9th Cir. 1973) *cert. denied* 414 U.S. 819 (1973); *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980); *Harten v. Coons*, 502 F.2d 1363 (10th Cir. 1974), *cert. denied*, 420 U.S. 963 (1975).

This holding was followed by the courts in *Lowe, supra,* and *Vallance, supra.*

In the case at bar, had the minor's mother, Ms. Scales, filed a lawsuit on her own behalf, her cause of action would have been dismissed on the same grounds announced in *Shults, supra, Lowe, supra,* and *Vallance, supra,* not on the grounds of military discipline as in *Stencel, supra.* Furthermore, the court in *Parker v. United States,* 611 F.2d 1007 (5th Cir. 1980), stated that the military discipline factor is more relevant to the decision of whether to imply an exception than it is to the exception's application. 611 F.2d at 1013.

At bottom, in medical malpractice claims, the difference between the claim made by military personnel and that brought by a military dependent is merely a matter of status, because the medical care afforded military servicemen and their dependents has been recognized as a valuable prerogative incident to their service.[13] If the following statement made by the Court of Appeals in this case is correct:

> "If the court must second-guess the judgment of military officers in assessing their treatment of a member of the armed services, the claim will be deemed to have a disruptive effect on discipline and will be dismissed. *See Stencel, supra,* 661 F.2d at 134; *Hunt, supra,* 636 F.2d 599." (685 F.2d at 973.)

then the dependents of military personnel would not have been allowed to recover against the government in any of these cases[14] because it would be necessary for the court to "second-guess" the judgment of the military officers in assessing their treatment of such dependents.

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[13] *Costley v. United States,* 181 F.2d 723 (5th Cir. 1950).

[14] *Costley v. United States,* 181 F.2d 723 (5th Cir. 1950) (the wife of a serviceman became permanently paralyzed because the Army doctor gave her the wrong medicine for a spinal anesthetic during delivery); *Bridgford v. United States,* 550 F.2d 978 (4th Cir. 1977) (retired military officer's dependent injured as a result of medical malpractice); *Williams v. United States,* 435 F.2d 804 (1st Cir. 1970) (serviceman's child died after being refused to military hospital); *Arrendale v. United States,* 469 F.Supp. 883 (N.D. Tex. 1979) (injuries to serviceman's son as a result of medical malpractice); *Grigalauskas v. United States,* 103 F.Supp. 543 (D.Mass.

(Continued on Page 15)

In this connection, the Court of Appeals also heavily relies on *Monaco u United States*, 661 F.2d 129 (9th Cir. 1981), *cert. denied*, 102 U.S. 2269, (1982), in which Denise Monaco, the daughter of a serviceman, brought suit against the government to recover for permanent injuries induced by birth defects caused by a previous genetic change in her father which occurred when he was exposed to radiation while on active duty. Though the Court states that the Plaintiff is seeking relief for an injury to herself, her cause of action was entirely based on establishing that the genetic change in her father was caused by negligent acts of commission or omission by the government. In other words, her injuries were caused by her father's injuries, which, in turn, were caused by the government's negligence. Her damages were not directly caused by the government's conduct but rather were indirectly caused. As the court points out, the focus of *Monaco* is ultimately on the injury to the plaintiff's father which occurred while he was on active duty. This forces the court to "... examine the government's activity in relation to military personnel on active duty. It is this examination that the *Feres* doctrine seeks to avoid." 661 F.2d at 134. The court goes on to say that although this analysis has been used to bar wrongful death claims by heirs of servicemen, and claims for genetic injuries to children caused by Agent Orange, the

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[14] *(Continued from Page 14)*

1951), aff'd, 195 F.2d 494 (1st Cir. 1952) (the dependent child of a serviceman was injured by the Army doctor in the course of post-natal care at the Army hospital); *Sigler u LeVan*, 485 F.Supp. 185 (D.Md. 1980) (the widow and daughter of an Army counterintelligence agent could proceed with claims for conversion, replevin and constitutional injuries against military and non-military intelligence officers); *Steele u United States*, 463 F.Supp. 321 (D.Alas. 1978) (the child of a serviceman lost his eye because the Army optometrist failed to promptly advise parents of the disease the child suffered); *Fournier u United States*, 220 F.Supp. 752 (D.Miss. 1963) (the wife of a serviceman lost her life at an officers' club because of the negligence of the government employees); *Herring u United States,*, 98 F.Supp. 69 (D.Colo. 1951) (the wife of a serviceman was injured as a patient in the Army hospital); *Messer u United States,*, 95 F.Supp. 512 (D.Fla. 1951) (a sergeant's wife was injured by the negligence of the Army hospital employees); *Wilson u United States,*, 76 F.Supp. 580 (D. Hawaii 1948) (a minor child of the Naval officer lost his life due to the negligence of a Naval medical corpsman); *Jones u United States,*, 236 F.Supp. 756 (E.D.N.C. 1964) (Serviceman's wife injured in auto accident).

analysis has not been used to bar claims of civilians injured directly by military personnel. In the present case, Charles Lewis Scales was injured directly by the negligence of government medical personnel and an examination of such conduct has always been within the ambit of the Courts under the FTCA. How can it possibly disrupt military discipline to award an innocent baby just and adequate compensation for tragic injuries caused directly to him by the clear-cut negligence of medical personnel? Military discipline is simply not that fragile, especially in the realm of medical treatment, where no uniquely military concepts are at work, and where the doctor-patient relationship is not radically different from that found in civilian life.

Furthermore, cases in which the *Feres* doctrine applied always involved injuries to military personnel. In the case at bar, however, no injuries to any military personnel are involved.[15] This factual difference makes the *Feres* doctrine inapplicable because the authority of a decision is co-extensive only with the facts on which it is founded.[16] It is also well established that the claims of dependents of servicemen have been regularly allowed, and the *Feres* doctrine has not been applied to dependents, as distinguished from the servicemen themselves who receive injury "incident to service." Cases dealing with such claims[17] hold that a dependent who receives injuries as a result of the negligence of service personnel acting within the course and scope of their employment may pursue their remedies as granted under the FTCA, without regard to the *Feres* doctrine.

In Texas, a child who is born alive and survives does have a cause of action for prenatal injuries sustained at any prenatal stage.[18] Logically, this means that a child, from the

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[15]Ms. Scales was not injured by the military medical personnel.

[16]*Rutkin* u *United States, 343 U.S. 130 (1952); United States* u *Neifert-White Co.*, 390 U.S. 228 (1968); *Kemart Corp.* u *Printing Arts Research Lab., Inc.*, 232 F.2d 897 (9th Cir. 1956); *W-R C.* u *Sova*, 106 F.2d 478 (6th Cir. 1939); *United States.* u *Brand*, 79 F.2d 605 (2d Cir. 1935), *cert. denied*, 296 U.S. 655 (1936); *C.F. Mederia Co.* u *Commissioner of Internal Revenue*, 38 F.2d 812 (6th Cir. 1930); *Means* u *United States*, 6 F.2d 975 (2d Cir. 1925).

[17]See Note 14, *supra.*

[18]See *Yandell* u *Delgado*, 471 SW2d 569 (Tex. 1971).

time of conception, has an independent legal status from that of its mother. The unborn child has an independent cause of action against anyone who negligently injures him while he is still in the womb. In essence there are two separate and distinct causes of action existing against a tortfeasor in the situation where a pregnant woman and a fetus are injured by the tortfeasor. This is exactly the situation which occurred in the case at bar. Here, government doctors committed several acts of negligence[19] and each act of negligence was a proximate cause of injury to Charles Lewis Scales himself and gave rise to an entirely independent cause of action by himself, regardless of whether his mother was also injured. Since Charles is not a serviceman and his injuries and cause of action are not derivative of or dependent upon any injury to his mother, the *Feres* doctrine is simply not applicable here.

This conclusion is buttressed by this Court's analysis in *Stencel, supra*. There the *Feres* doctrine was applied to bar the manufacturer from bringing in the government as a third-party defendant.[20] The trial court sustained the motion of the United States for summary judgment against the plaintiff, and the motion to dismiss the cross claim. The manufacturer appealed. The circuit court affirmed the dismissal and certiorari was granted. In affirming the dismissal, the U.S. Supreme Court held:

> "We conclude, therefore, that the third-party indemnity action in this case is unavailable for essentially the same reasons that the direct action by Donham is barred by *Feres*. The factors considered by the *Feres* court are largely applicable in this type of case as well; hence, the right of a third party to recover in an indemnity action against the United States recognized in *Yellow Cab*, must be held limited by the rationale of *Feres* where the injured party is a serviceman. Since the relationship between the United States and petitioner is based on a

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[19]E.g., (1) giving the mother a rubella shot; (2) failing to diagnose the mother's pregnancy; (3) failing to send the mother home until the epidemic of rubella in the base was over; and/or (4) failing to consult with the mother as to the effects of the rubella on Charles Lewis Scales, who had already been conceived and was alive in his mother's womb.

[20]See Note 7, *supra*.

commercial contract, there is no basis for a claim of unfairness in this result." (341 U.S. at 673-674) (Emphasis added).

In *Monaco, supra*, and *In Re Agent Orange Product Liability Litigation*, 506 F.Supp. 762 (E.D.N.Y. 1980), the *Feres* doctrine was also applied to bar the claims made by children of military personnel for damages for their own genetic and physical harm resulting from their parents' chromosomal and genetic changes which were caused by the exposure to radiation or chemicals during the parents' military service.[21] This application of the "*Feres* doctrine" is well illustrated by the court in *In Re Agent Orange Product Liability Litigation, supra*, in the following words:

> "Only the veterans' children's claim of direct injury requires additional analysis. Here, children of Vietnam veterans allege that they have suffered genetic and somatic injury as a result of a parent having been exposed to Agent Orange. This presents the difficult question of whether the injuries suffered by these children, who are not and never were members of the military, are derivative injuries suffered 'incident to or arising out of military service', or whether they are direct injuries independent of those of their parents.
>
> "The closest precedent is *Monaco v. United States*, No. C 79-0860 (N.D.Cal. Nov. 2, 1979), where plaintiff, the daughter of a serviceman exposed to radiation during his military service, claimed the government's negligence towards her father caused her to be affected with 'chromosomal and genetic change' which in turn resulted in her being born with a birth defect. *Monaco v. United States*, slip op. at 3. There, the court held that '[the] test of *Feres* is whether plaintiff's injuries have as their genesis injuries allegedly sustained incident to the performance of military service', slip op. at 3, and found plaintiff's claim barred under this standard because '[plaintiff's] injuries are directly related to and arise out of the injury sustained by her father at the time he was a member of the United States Army." Slip op. at 4.

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[21] *But see Hinkie v. United States*, 524 F.Supp. 227, 279, 285 (E.D. pa. 1981).

> "In the case at bar, the children's claims of genetic and physical harm are indirect because they arise only as the result of injuries to their veteran parents. The injuries alleged by the children had their genesis in the exposure of their parents and, assuming that Agent Orange could produce the genetic changes alleged, the injuries were inflicted on the serviceman at the time of exposure. Thus, although Agent Orange may ultimately be found to have caused injuries in subsequently conceived children, those injuries, nevertheless, arose out of and were incident to the service of the parent. To hold otherwise might open the door for governmental liability to countless generations of claimants having ever diminishing genetic relationship to the person actually injured." (Emphasis added) (506 F.Supp. at 781)

The claims mentioned in the above-cited cases were triggered by the servicemen's injuries. If there had been no injury to the servicemen, then the children would not have been injured and would have had no cause of action. In these cases the servicemen's injuries were the origin of the lawsuits. The children's lawsuits, as well as their injuries, were entirely derivative of the servicemen's injuries. These cases therefore contained the two essential elements of the *Feres* doctrine.

In the present case, however, Charles' injuries were in no way derivative of any injury to his mother, but rather were the direct result of the negligence of Air Force medical personnel toward him. In fact — the critical fact — the mother, Ms. Scales, was not injured. Stated another way, Charles has an independent ground of recovery because he was directly injured by the medical personnel's negligence. His cause of action is not dependent on establishing either that his mother was injured or that the government was negligent in the medical care and treatment of his mother. Such issues are irrelevant to Charles' cause of action because he was in existence and present at the time of the medical treatment of his mother and such treatment was received by him directly, resulting in the terrible injuries and damages at hand. Therefore, in accordance with Texas law,[22] and the intent of the FTCA, Charles is entitled to seek redress from his govern-

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[22]See Note 2, *supra*.

ment as would any other civilian or military dependent.

The significance, for purposes of the *Feres* doctrine, of Charles' independent cause of action for medical malpractice is best illustrated by a comparison of two series of cases: in the first group of cases it has been consistently held that a claim for medical malpractice by a serviceman is barred under *Feres*, because of his military status.[23] By contrast, a second group of cases holds that similar medical malpractice claims brought against the government by minor dependents of servicemen are not barred by *Feres*, despite the claimants' relation to the military.[24] Accordingly, if a servicewoman and her child were both admitted to a military hospital for treatment and each was injured due to the negligence of military medical personnel, *Feres* would bar only the mother's action, not the child's. Likewise, a fetus who necessarily accompanies his servicewoman mother for treatment at a military hospital, and is himself negligently injured as a result, has a cause of action which is not barred by *Feres*.

In addressing the breadth to be given this exception to the FTCA, it bears mention that the *Feres* doctrine has been uniformly and cogently criticized by courts[25] and commentators[26]. The criticism is summarized in *Hall u United States*, 528 F.Supp. 963 (D.N.J. 1981). In dismissing a medical malpractice action as barred by the *Feres* doctrine, the district court took the occasion to criticize the *Feres* doctrine, which precluded a serviceman's action against another member of the armed forces where the injury arose out of or was incident to his military service. The court found fault with the

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[23]See Note 12, *supra*.

[24]See *Arrendale*, *Grigalauskas*, *Steele*, and *Wilson*, Note 14, *supra*.

[25]See *Parker*, *supra*, 611 F.2d at 1010-11; *Monaco*, *supra*, 661 F.2d at 132; *Veillette*, *supra* Note 9, 615 F.2d at 507; *Thomason u Sanchez*, 539 F.2d 955, 957 (3rd Cir. 1976), *cert. denied* 429 U.S. 1072 (1977).

[26]Note, *The Supreme Court and the Tort Claims Act: End of an Enlightened Era?*, 27 Clev.St.L.Rev. 267 (1978); Note, *Stencel Aero Engineering Corp. u United States: An Expansion of the Feres Doctrine to Include Military Contractors, Subcontractors, and Suppliers*, 29 Hastings L.J. 1217 (1978); Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 Mich.L. Rev. 1099 (1979).

Note, *The Effect of the Feres Doctrine on Tort Acts Against the United States by Family Members of Servicemen*, 50 Fordham L.Rev. 1241 (May 1982).

various rationales advanced to support *Feres*, initially noting that decisions subsequent to *Feres* justified the doctrine as necessary to maintain military discipline, whereas *Feres* itself makes no mention of a possible detriment to discipline. Another reason advanced to support *Feres* — that no private right of action should exist because of the "distinctly federal" relationship between a soldier and the government — was criticized by the court as being equally applicable to many other government agencies against which private actions are allowed. Also, the court noted that an argument often advanced in support of *Feres* is that there is no analogous private right of action, and since the FTCA limits government liability to instances where an analogous private right of action exists, *Feres* is consistent with the FTCA. However, the court criticized this argument, stating that it is sufficient that an analogous private right of action is conceivable. Finally, the court argued that in determining whether military immunity should apply, a distinction should be drawn between acts which only the military can perform, such as combat operations, and acts such as medical care, which are routinely performed by civilians.

In summary, the factual situation in this case at bar is essentially different from that in *Feres*, *supra*; *Stencel*, *supra*; *Monaco*, *supra*, and *In Re Agent Orange*, *supra*. Nothing in the rationale of *Feres* supports, let alone compels, the Court of Appeals' destruction of a civilian's independent cause of action to seek compensation for the staggering injuries he received as a result of the negligence of military physicians. "There is no justification for this Court to read exceptions into the Act [FTCA] beyond those provided for by Congress." *Rayonier, Inc. v. United States*, 352 U.S. 315, 320 (1957). As stated by this Court in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1950) as follows:

> "The Federal Tort Claims Act waives the Government's immunity from suit in sweeping language. It unquestionably waives it in favor of an injured person . . . ." (340 U.S. at 547.)

Under these circumstances, it would be an unprecedented, unjustified extension of the *Feres* doctrine to bar recovery in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

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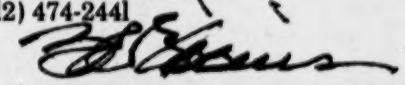

BOB GIBBINS

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1983, I served the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit by mailing, via certified mail, return receipt requested, three copies, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

BOB GIBBINS

APPENDICES

A. Opinion of the Court of Appeals.
B. District Court's Memorandum of Findings of Fact and Conclusions of Law.
C. District Court's Amended Order.
D. District Court's Judgment.
E. Fifth Circuit's Judgment.
F. Fifth Circuit's Order Denying Petitioner's Suggestion for Rehearing En Banc.

APPENDIX A

Judy Renee SCALES, As Next Friend of
Charles Lewis Scales,
Plaintiff-Appellee,

UNITED STATES of America,
Defendant-Appellant.

No. 81-1367.

United States Court of Appeals,
Fifth Circuit.

Sept. 13, 1982.

Plaintiff infant sued the United States under Federal Tort Claims Act alleging that he was born with congenital rubella syndrome as a result of negligent medical treatment that his mother received during her basic training for service in the Air Force. The United States District Court for the Western District of Texas, Jack Roberts, J., rendered judgment against the United States, and the Government appealed. The Court of Appeals, Thornberry, Circuit Judge, held that claim was barred by *Feres*, notwithstanding that infant had an independent cause of action under state tort law.

REVERSED.

1. United States 78(16)

Infant plaintiff's Federal Tort Claims Act suit based on alleged negligent medical treatment of his then pregnant mother during her basic training for service in the Air Force was barred by the *Feres* doctrine, notwithstanding that the infant, who was born with congenital rubella syndrome, had an independent cause of action under state tort law for wrongful life. 28 U.S.C.A. §§1346, 2671-2680.

2. United States 78(16)

If a claim falls within the *Feres* exception to the waiver of tort liability under Federal Tort Claims Act, the court lacks jurisdiction. 28 U.S.C.A. §§1346, 2671-1680.

Edward C. Prado, U.S. Atty., San Antonio, Tex., Eloise E. Davies, Barbara B. Price, Robert S. Greenspan, Attys., Civ. Div., Dept. of Justice, Washington, D.C., for defendant-appellant.

Gibbins & Wash, Bill Zook, Bob Gibbins, Yii-Chwen (Francis) Pan, L. Tonnett Byrd, Austin, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, JOHNSON and GARWOOD, Circuit Judges.

THORNBERRY, Circuit Judge:

Charles Lewis Scales, an infant, sued the United States through his mother, Judy Renee Scales, as next friend under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§1346, 2671-1680, alleging that he was born with congenital rubella syndrome as a result of the negligent medical treatment his mother received during her basic training for service in the Air Force. Charles alleged three instances of negligent conduct. First, he claimed that Air Force medical personnel were negligent in administering a rubella vaccination to his mother without determining first whether she was pregnant. They were negligent a second time in failing to ascertain whether his mother was pregnant when she later contracted rubella. And finally, they were careless in failing to send for her medical records, which indicated that she had been diagnosed "probable rubella," once it was discovered that she was pregnant.

[1] Having denied the government's motion to dismiss based on *Feres u United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the district-court accepted each of Charles' contentions and entered judgment against the United States in the amount of $625,000. The government continues to insist on this appeal that Charles' claim is barred by the *Feres* doctrine, which prohibits lawsuits brought by servicemen under the FTCA when the injuries involved in the lawsuit arise out of activities incident to military service. Id. at 147, 71 S.Ct. at 159. The government also argues, in the alternative, that the district court clearly erred in finding that a vaccination was administered during Ms. Scales' basic

training and that state tort law, in any event, will not support a damage award based on a wrongful life theory. We hold that Charles' claim against the government is barred by *Feres* as a matter of law. Consequently, our discussion of the facts need only be brief, and we find it unnecessary to reach the government's alternate points of error.

When Judy Renee Scales was inducted into the United States Air Force on June 27, 1977, and assigned to undergo basic training at Lackland Air Force Base in San Antonio, she was unaware that she was approximately one month pregnant. During her basic training, Lackland AFB experienced an outbreak of rubella. Rubella is an infectious disease, commonly known as German measles, that may cause permanent injury to an unborn fetus, particularly if it is contracted in the first trimester of pregnancy. Ms. Scales believes that she received a rubella vaccination as part of the battery of inoculations given all recruits during basic training. This vaccination, allegedly administered to Ms. Scales while she was pregnant, is claimed to have resulted in Charles' congenital rubella syndrome. The government insists that there is no evidence, other than hearsay, to support the conclusion that Ms. Scales received a rubella vaccination during her basic training. Furthermore, assuming that Ms. Scales was vaccinated against rubella, the government argues that there is no evidence demonstrating a causal connection between a rubella vaccination administered to the mother and congenital rubella syndrome in the child.

On July 25, 1977, Ms. Scales was hospitalized at Lackland AFB with complaints of nausea, stiff joints, and a rash. A physician in the dispensary diagnosed her symptoms as "probable rubella," but neither informed Ms. Scales of the diagnosis nor made any effort to determine whether she was pregnant. When Ms. Scales completed her basic training at the end of August 1977, she was transferred from Lackland AFB to Keesler Air Force Base in Biloxi, Mississippi. One month later she discovered that she was nineteen weeks pregnant. The Air Force physician treating Ms. Scales during her pregnancy never requested her medical records from Lackland, even though he administered two rubella titer tests that indicated Ms. Scales' exposure to rubella at some point in the past. Unfortunately, the tests cannot pinpoint accu-

rately when a rubella infection has occurred unless the infection is acute, which was not Ms. Scales' case. Ms. Scales was discharged from the Air Force in December, 1977, because of her pregnancy. On March 21, 1978, she gave birth to Charles Lewis Scales. Charles suffers from several congenital defects, including cataracts, a heart murmur, possible neurological damage, respiratory problems, growth deficiencies, and possible mental and physical retardation. Expert testimony at trial agreed that Charles' defects are characteristic of congenital rubella syndrome resulting from his mothers' exposure to rubella during the early stages of her pregnancy. Ms. Scales maintains that if she had known about the "probable rubella" diagnosis and the effect of rubella on an unborn child, she would have aborted the fetus she was carrying. Thus, the basic thrust of Charles' theory of damages is that but for the negligence of Air Force medical personnel he would never have been born. The question we must address, however, is not whether Charles presents a supportable legal theory, but whether the court below had jurisdiction to consider his claim.

[2] The FTCA provides that the United States shall be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. §2674. While this act "waives the Government's immunity from suit in sweeping language," *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 71 S.Ct. 399, 402, 95 L.Ed. 523, 528 (1951), several statutory and judicial exceptions limit the Government's waiver of immunity. Among these is the exception for liability for injuries incident to military service. In *Feres*, *supra*, the Supreme Court enunciated what has come to be known as the *Feres* doctrine, which renders the United States "not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 147, 81 S.Ct. at 159.[1] If a claim falls within the *Feres*

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[1]This Court explained the evolution of the *Feres* doctrine from *Brooks v. United States*, 337 U.S. 49, 69 S.Ct. 918, 93 L.Ed. 1200 (1949), to the present in *Parker v. United States*, 611 F.2d 1007, 1009-1011 (5th Cir. 1980). See also *Woodside v. United States*, 606 F.2d 134, 138-42 (6th Cir. 1979), *cert. denied*, 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980); *Citizens National Bank of Waukegan v. United States*, 594 F.2d 1154, 1156-58 (7th Cir. 1979).

exception to the waiver of tort liability, this Court lacks jurisdiction to hear the case. *United States u. Orleans*, 425 U.S. 807, 814, 96 S.Ct. 1971, 1976, 48 L.Ed.2d 390, 398 (1976); *Monaco u. United States*, 661 F.2d 129, 132 (9th Cir. 1981), *cert. denied*, _____ U.S. _____ , 102 S.Ct. 2269, 73 L.Ed.2d _____ (1982).

The Supreme Court clarified and reaffirmed the rationale underlying the *Feres* doctrine in *Stencel Aero Engineering Corp. u. United States*, 431 U.S. 666, 671, 97 S.Ct. 2054, 2057-58, 52 L.Ed.2d 665, 670 (1977). First, the Court reasoned that it would be inconsistent with the distinctively federal nature of the relationship between the federal government and its servicemen to make the government's liability dependent upon the fortuity of where the soldier happened to be stationed at the time of the injury, as would result under the FTCA since it requires the law of the state where the act or omission occurred to govern liability. Id. at 671, 97 S.Ct. at 2058. Second, the Court noted that Congress provided a special remedy for servicemen in passing the Veterans' Benefits Act, 38 U.S.C. 301-1008 (1976 & Supp. 1978), which creates a "no fault" compensation scheme as a substitute for tort liability for service-related injuries. A tort claim under the FTCA, such as Charles' see *Monaco, supra*, 661 F.2d at 138, could circumvent the limitation established by the act and "judicially admit at the back door that which has been legislatively turned away at the front door." Id. 431 U.S. at 673, 97 S.Ct. at 2059 quoting, *Laird u. Nelms*, 406 U.S. 797, 802, 92 S.Ct. 1899, 1902, 32 L.Ed.2d 499 (1972).

[3] While these two prongs of the rationale underlying the *Feres* doctrine are recognized frequently in cases discussing the rule, see, e.g., *Johnson u. United States*, 631 F.2d 34, 35-36 (5th Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007, 69 L.Ed.2d 389 (1981); *Parker, supra*, 611 F.2d at 1011; *Daberkow u. United States*, 581 F.2d 785, 787-88 (9th Cir. 1978), the third predicate for application of the doctrine stands out as the most important consideration in any single case. It is the concern for preserving military discipline. *United States u. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 1858, 10 L.Ed.2d 805 (1963); *Hunt u. United States*, 636 F.2d 580, 599 (D.C.Cir. 1980). The Supreme Court explained the focus of

this concern in *Stencel*: "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' " 431 U.S. at 672-73, 97 S.Ct. at 2058, quoting *United States u. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 143, 99 L.Ed. 139 (1954). The need to preserve military discipline, standing alone, can justify dismissal of suits arising out of activities incident to military service even when there was no command relationship between the claimant and the individual tort-feasor. *Monaco, supra*, 661 F.2d at 132.

Reasoning as the Supreme Court did in *Stencel* and as the Ninth Circuit did in *Monaco, supra*, 661 F.2d at 133-34, we hold that *Feres* bars Charles' claim for recovery. *Feres* previously has been applied to bar suits brought by non-military personnel. Two of the three cases involved in *Feres* were brought by widows of servicemen. The Court in *Stencel* relied on *Feres* to prohibit an action brought by a third party indemnity plaintiff. 431 U.S. at 673, 97 S.Ct. at 2059. In *Monaco*, a case very similar to the one before us, the Ninth Circuit held that *Feres* barred a claim by an infant who alleged that the government's negligence caused chromosomal and genetic changes in her father which in turn caused her to be born with a serious birth defect. 661 F.2d at 130. Contrary to appellee's assertion, then, the fact that Charles was not on active duty at the time of the injury does not foreclose application of the *Feres* doctrine, nor does it matter that Charles has an independent cause of action under state tort law. Id. at 134. *Stencel* and its progeny direct our inquiry to the manner in which the policies underlying *Feres* are affected — specifically the impact on military discipline — rather than to the status of the claimant.

The policies that support the *Feres* doctrine clearly would preclude Charles' mother from bringing suit against the United States based on the negligent medical treatment she received while on active duty in the Air Force. Two of the claims rejected in *Feres* were based on allegations of medical malpractice. Moreover, this Court has held repeatedly since *Feres* that claims based on medical malpractice fall within

the bounds of the *Feres* doctrine when the plaintiff was a serviceman on active duty at the time of the alleged malpractice. *Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1150 (5th Cir. 1981); *Vallance v. United States*, 574 F.2d 1282, 1283 (5th Cir.), *cert. denied*, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed.2d 423 (1978); *Shults v. United States*, 421 F.2d 170 (5th Cir. 1969). See also *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). These cases tell us not only that Ms. Scales is barred from suit but also that the medical treatment administered to Ms. Scales was incident to military service. Thus, the only question that remains is whether a suit initiated by Charles would have the same disruptive effect on military discipline as a suit brought by his mother. In asking this question, courts will focus on the type of examination that will be demanded of the district court. If the court must second-guess the judgment of military officers in assessing their treatment of a member of the armed services, the claim will be deemed to have a disruptive effect on discipline and will be dismissed. See *Stencel*, *supra*, 431 U.S. at 674, 97 S.Ct. at 2059; *Monaco*, *supra*, 661 F.2d at 134; *Hunt*, *supra*, 636 F.2d at 599.

If we accept the argument that a suit brought by Charles' mother would tend to undermine military discipline, which we must since it is the law, then it is impossible to see how the result should be different if Charles sues the government instead. Appellee attempts to escape *Feres* by relying on those cases that allow dependents of servicemen to recover for negligent medical treatment they received in the hands of army medical personnel, e.g., *Costley v. United States*, 181 F.2d 723, 726. (5th Cir. 1950); *Grigalauskas v. United States*, 103 F.Supp. 543, 549 (D.Mass.1951), aff'd, 195 F.2d 494 (1st Cir. 1952), and by insisting that *Monaco* is distinguishable on the ground that Denise Monaco's claim "derived" from her father's claim. We find appellee's arguments unpersuasive.

In cases that allow the dependents of servicemen to sue the government, the negligent conduct is directed to the dependent alone and does not involve any decisions by the military toward enlisted personnel. Charles' allegations of negligence by contrast focus entirely on the medical treatment that Air Force physicians gave his mother. The treatment accorded his mother is inherently inseparable from the

treatment accorded Charles as a fetus in his mother's body. Consequently, the district court's analysis is the same whether the suit is brought by Charles or Ms. Scales. In either instance, the judge is placed in the position of questioning the propriety of decisions or conduct of fellow members of the Armed Forces. This is precisely the type of examination that *Feres* seeks to avoid. See *Broudy u United States*, 661 F.2d 125, 127 (9th Cir. 1981).

Furthermore, though *Monaco* may be distinguished superficially as appellee suggests, the Ninth Circuit in that case did not rest its decision on the fact that the infant plaintiff's claim lacked an independent ground of recovery. In fact, Judge Nelson noted specifically that Denise sought relief for injury to herself, "but this does not change the substantive analysis: the court still must examine the Government's activity in relation to military personnel on active duty." *Monaco, supra*, 661 F.2d at 134. As we have noted already, the medical treatment involved in this case was administered to Charles' mother while she was on active duty. Whether it constitutes negligence with respect to Charles cannot be determined without requiring the court to second-guess military judgment in a manner inconsistent with the concern for military discipline that underlies the *Feres* doctrine.

For the foregoing reasons we are compelled, however reluctantly, to reverse the judgment of the district court and dismiss the claim as barred by *Feres*. We are not blind to the tragedy of Charles' condition and we regret the effects of our conclusion. Nevertheless, we are not writing on a clean slate. Though the rationale underlying *Feres* has been criticized by courts, e.g., *Monaco, supra*, 661 F.2d at 132; *Parker, supra*, 611 F.2d at 1010-11, and commentators, see, e.g., Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?* 77 Mich.L.Rev. 1099 (1979), it remains the law to which we must adhere.

REVERSED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CIVIL ACTION NO. A-79-CA-70
UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a personal injury action filed by Judy Renee Scales as next friend for her minor son, Charles Lewis Scales, seeking damages for Charles Lewis Scales under the provisions of the Federal Tort Claims Act, 28 U.S.C. 2671, et seq.

At all times material herein, Judy Renee Scales, a single woman, was an active member of the United States Air Force. On March 21, 1978, Judy Renee Scales gave birth to Charles Lewis Scales who was severely afflicted with congenital rubella syndrome. As a result of this syndrome, he is physically and mentally retarded, he has hearing and vision impairments, heart murmur, and respiratory and blood supply dysfunction, all of which are of a permanent nature. He has already undergone open heart surgery and two surgical procedures on his right eye for rubella cataracts. In all probability he will require custodial care throughout his life and will never be employable.

Judy Renee Scales was inducted into the United States Air Force on June 27, 1977. As a basic training inductee at the Lackland Air Force Base, she received a rubella or German measles vaccination from Air Force medical personnel sometime between June 27 and July 25, 1977. On July 25 she was hospitalized at Lackland Air Force Base and on July 26, 1977 she was diagnosed as having "probable rubella". On September 25, 1977, after having been transferred to Keesler Air Force Base in Biloxi, Mississippi, she was diagnosed as being pregnant.

It is plaintiff's contention that the Air Force medical personnel at Lackland Air Force Base were negligent (1) by injecting Judy Renee Scales with a rubella or German measles vaccination while she was in her first trimester of pregnancy, (2) by failing to conduct a pregnancy test on Judy

Renee Scales prior to administering the rubella vaccination, (3) by failing to conduct any tests which would determine Judy Renee Scales' susceptibility to rubella or German measles prior to administering the rubella vaccination and (4) by failing to make adequate inquiry of Judy Renee Scales as to whether or not she was pregnant prior to administering the rubella vaccination. The record is undisputed that if her pregnancy had been established, no vaccination would have been given. In addition, plaintiff contends that after Judy Renee Scales was diagnosed as having "probable rubella" on July 26, 1977, the Lackland Air Force medical personnel were negligent (1) by failing to conduct a pregnancy test on Judy Renee Scales to determine if she was pregnant, (2) by failing to inform Judy Renee Scales that she had "probable rubella", (3) by failing to inform Judy Renee Scales of the adverse affects on a fetus when the mother contracts rubella or German measles during the first trimester of pregnancy and (4) by failing to advise and offer Judy Renee Scales the option of an abortion. The record is undisputed that if the medical personnel had determined Judy Renee Scales was pregnant when she was diagnosed as having "probable rubella", they would have counseled and instructed her about the adverse affects on a fetus when the mother contracts rubella or German measles during the first trimester of pregnancy and they would have instructed her concerning her options to terminate the pregnancy with an abortion. Plaintiff further contends that after Judy Renee Scales was diagnosed as being pregnant on September 25, 1977, the Keesler Air Force Base medical personnel were negligent (1) by failing to conduct proper tests to determine if Judy Renee Scales had been infected with rubella or German measles during her pregnancy, (2) by failing to obtain Judy Renee Scales' medical records from Lackland Air Force Base which would have revealed that she had been diagnosed as having "probable rubella", (3) by failing to inform Judy Renee Scales of the adverse affects on a fetus when the mother contracts rubella or German measles during the first trimester of pregnancy and (4) by failing to advise and offer Judy Renee Scales the option of an abortion. Again, the record is undisputed that if the medical personnel had determined that Judy Renee Scales had recently been infected with "probable rubella" when she

was diagnosed as being pregnant, they would have informed and counseled her concerning the adverse affects on a fetus when the mother contracts rubella or German measles during the first trimester of pregnancy and they would have counseled her concerning her options to terminate the pregnancy with an abortion. It is Judy Renee Scales' contention that had she been informed of the severe consequences of having rubella or German measles during the first trimester of pregnancy, she would have aborted any diagnosed pregnancy. It is Judy Renee Scales' further contention that she was never informed that "probable rubella" had been diagnosed in July of 1977 and that she first discovered that fact on January 8, 1980 when plaintiff's attorneys were furnished with medical records from Lackland Air Force Base.

The Government denies that Judy Renee Scales received a rubella or German measles vaccination while stationed at Lackland Air Force Base and further denies that the medical personnel at Lackland Air Force Base or Keesler Air Force Base were negligent in any respect. The Government further contends that plaintiff cannot now complain of any acts of alleged negligence on behalf of the medical personnel at Lackland Air Force Base or Keesler Air Force Base (other than the injection of Judy Renee Scales with a rubella or German measles vaccination between June 27 and July 25, 1977) because plaintiff did not refer to such conduct when his administrative claim (Standard Form 95) was filed.

Indeed the record establishes that no such complaint was possible at the time plaintiff's administrative claim was pending. The record reveals that prior to initiating the administrative claims procedure, plaintiff's personal physician requested Judy Renee Scales' medical records from the Government but in complying with this request the Government failed to include the records from Lackland Air Force Base dated July 26, 1977 with the diagnosis of "probable rubella". It was not until January 8, 1980, after the appropriate administrative agency had denied plaintiff's claim and after this suit was files that Government attorneys discovered the omission and furnished the appropriate records to plaintiff's counsel.

Based upon the record herein established, the Court enters the following Findings of Fact and Conclusions of Law:

A. FINDINGS OF FACT

1. Judy Renee Scales received a rubella or German measles vaccination at Lackland Air Force Base between June 27, 1977 and July 25, 1977.

2. At the time Judy Renee Scales received this vaccination she was in her first trimester of pregnancy with Charles Lewis Scales.

3. As a proximate result of Judy Renee Scales receiving this vaccination, Charles Lewis Scales was born with congenital rubella syndrome.

4. At all times material herein, the medical personnel at Lackland Air Force Base and at Keesler Air Force Base were acting for and on behalf of the United States of America and within the course and scope of their employment by the United States of America.

5. Between June 27, 1977 and July 25, 1977, the medical personnel at Lackland Air Force Base were negligent in the following respects:

(a) In administering a rubella or German measles vaccination to Judy Renee Scales while she was in her first trimester of pregnancy.

(b) In failing to conduct a pregnancy test on Judy Renee Scales prior to administering the rubella or German measles vaccination.

6. After Judy Renee Scales had been diagnosed as having "probable rubella", the medical personnel at Lackland Air Force Base were negligent in the following respect:

(a) In failing to conduct a pregnancy test on Judy Renee Scales.

7. After Judy Renee Scales had been diagnosed as being pregnant, the medical personnel at Keesler Air Force Base were negligent in the following respects:

(a) In failing to obtain Judy Renee Scales' medical records from Lackland Air Force Base which showed that she had been diagnosed as having "probable rubella" during her pregnancy.

(b) In failing to conduct proper tests to determine if Judy Renee Scales had been infected with rubella or German measles during her pregnancy.

8. Each of the negligent acts and omissions listed above was a proximate cause of Charles Lewis Scales being born with congenital rubella syndrome.

9. If Judy Renee Scales had been properly informed of the adverse effects on a fetus in cases where the mother contracts rubella or German measles during the first trimester of pregnancy, and if she had been counseled and offered the option of an abortion, she would have elected to have an abortion.

10. The defendant United States of America has not been prejudiced in any way by plaintiff's inability to allege in his Administrative Claim Form 95 the allegations of negligence subsequently made by plaintiff and about which the defendant has complained.

11. As a direct and proximate result of being afflicted with congenital rubella syndrome, Charles Lewis Scales has sustained the following damages:

(a) Medical and custodial expenses which in reasonable medical probability will be incurred in the future after he attains the age of eighteen years which are necessary for the proper treatment and care of his condition and reasonable in amount for the services rendered — $400,000.00.

(b) Pain, suffering and mental anguish which in reasonable medical probability he will sustain in the future after he attains the age of eighteen years — $200,000.00.

(c) Loss of capacity to work and earn money which in reasonable probability he will incur in the future after he attains the age of eighteen years — $25,000.00.

B. CONCLUSIONS OF LAW

1. Plaintiff, Charles Lewis Scales, is entitled to recover judgment against defendant United States of America based upon the Government's negligence as stated in Findings of Fact No. 5 (a) and (b), each of which acts of negligence was a proximate cause of his being born with congenital rubella syndrome.

2. Plaintiff, Charles Lewis Scales, is also entitled to recover judgment against defendant United States of America based upon the Government's negligence as stated in Findings of Fact No. 6 (a) and No. 7 (a) and (b), each of which acts of negligence was a proximate cause of his mother not terminating her pregnancy and of Charles Lewis Scales being born with congenital rubella syndrome.

3. The defendant United States of America is not entitled to any offset of the damages granted herein to plaintiff by reason of the fact this his mother, Judy Renee Scales, is presently married to a member of the United States Armed Forces.

4. Charles Lewis Scales is entitled to recover of and from the defendant, United States of America, the sum of $625,000.00.

5. The Clerk of the Court is hereby ordered to enter Judgment accordingly.

Entered on this the _____ day of _____, 1981, at Austin, Texas.

_____

JACK ROBERTS
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JUDY RENEE SCALES, AS NEXT FRIEND OF CHARLES LEWIS SCALES,	§	
Plaintiff,	§	
V.	§	CIVIL ACTION
	§	NO. A-79-CA-70
UNITED STATES OF AMERICA,	§	
Defendant.	§	

AMENDED ORDER

It having come to this Court's attention on the Court's own motion that a typographical error was committed in this Court's Memorandum of Findings of Fact and Conclusions of Law entered June 9, 1981, the Court hereby ORDERS pursuant to Federal Rule of Civil Procedure 60(a) that the Court's Findings of Fact number eleven (11) is amended to read as follows:

11. As a direct and proximate result of being afflicted with congenital rubella syndrome, Charles Lewis Scales has sustained the following damages:

(a) Medical and custodial expenses which in reasonable medical probability will be incurred in the future after he attains the age of eighteen years which are necessary for the proper treatment and care of his condition and reasonable in amount for the services rendered — Four Hundred Thousand Dollars ($400,000.00).

(b) Pain, suffering and mental anguish which in reasonable medical probability he will sustain in the future after he attains the age of eighteen years — Twenty-Five Thousand Dollars ($25,000.00).

(c) Loss of capacity to work and earn money which in reasonable probability he will incur in the future after he attains the age of eighteen years — Two Hundred Thousand Dollars ($200,000.00).

The remainder of the order of June 9, 1981 remains in full force and effect as originally ordered.

ENTERED on this the 12th day of June, 1981 at Austin, Texas.

JACK ROBERTS
Senior United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

JUDY RENEE SCALES, AS NEXT FRIEND OF CHARLES LEWIS SCALES,	§	
Plaintiff,	§	
V.	§	CIVIL ACTION
	§	NO. A-79-CA-70
UNITED STATES OF AMERICA,	§	
Defendant.	§	

This action came on for trial before the Court, Honorable Jack Roberts, United States District Judge, presiding and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Plaintiff, Charles Lewis Scales, is entitled to recover of and from the defendant, United States of America, the sum of Six Hundred Twenty-five Thousand dollars ($625,000.00).

Dated at Austin, Texas, this 9th day of June, 1981.

CHARLES W. VAGNER
Clerk of Court

By: Sally Looke, Deputy

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82-2467

D. C. Docket No. A-79-CA-70

JUDY RENEE SCALES,
as next friend
of CHARLES LEWIS SCALES,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before THORNBERRY, JOHNSON and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

September 13, 1982

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1367

JUDY RENEE SCALES, as
next friend of
CHARLES LEWIS SCALES,

Plaintiff-Appellee,

versus

UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 09/13/82, 5 Cir., 198 _____ , _____
F.2d _____).

(October 19, 1982)

Before THORNBERRY, JOHNSON and GARWOOD, Circuit Judges.

PER CURIAM:

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 16), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges

and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Office-Supreme Court, U.S.
FILED
MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1203

In the Supreme Court of the United States

OCTOBER TERM, 1982

JUDY RENEE SCALES, AS NEXT FRIEND OF CHARLES LEWIS SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1203

JUDY RENEE SCALES, AS NEXT FRIEND OF CHARLES LEWIS SCALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, the infant son of a former servicewoman, contends that the court of appeals erred in ruling that *Feres* v. *United States*, 340 U.S. 135 (1950), bars his suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680, for injuries he sustained as a result of the Air Force's allegedly negligent treatment of his mother while she was on active duty and before petitioner was born.

1. Petitioner alleges that while his mother was on active duty in the Air Force, military medical personnel: (1) negligently administered a rubella vaccination to her without attempting to determine whether she was pregnant; (2) negligently failed to ascertain that she was pregnant at the time she contracted rubella; and (3) negligently failed to counsel her about the effects of rubella on a first-trimester

fetus and about the possibility of having an abortion. Petitioner alleges that, as a result, he was born with cogenital rubella syndrome, a pattern of serious birth defects that results from the exposure of a pregnant woman to rubella. Pet. App. A2-A4, A9-A10.[1]

Prior to trial, the government moved for dismissal of the complaint on the ground that petitioner's claim was barred under *Feres* because it was based on injuries arising out of activities incident to the military service of his mother. The United States District Court for the Western District of Texas denied the motion, ruling that the action was not barred by *Feres* because petitioner "is not and never has been a member of the armed forces" (E.R. 59).[2] After a trial, the district court found in favor of petitioner on each of his claims and entered a judgment against the United States for $625,000 (Pet. App. A9-A17).

The court of appeals reversed, holding that *Feres* precludes petitioner's claim (Pet. App. A1-A8). The court of appeals noted that the principal basis of the *Feres* doctrine is the risk that military discipline will be undermined if servicemen are allowed to question their superiors' acts in court (*id.* at A5-A6). Accordingly, the court of appeals

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[1]Petitioner advances two theories of liability. First, he alleges that he suffered prenatal injuries because of the negligence of Air Force personnel in administering a rubella vaccination to his mother without determining whether she was pregnant. Second, he alleges that the negligent failure of Air Force medical personnel to determine whether his mother was pregnant when she was diagnosed as having "probable rubella" or to determine, when her pregnancy was later diagnosed, that she had contracted rubella in her first trimester, and to counsel her about the effects of rubella on a fetus, prevented her from seeking an abortion. See Pet. App. A4, A9-A11. This latter claim is generally referred to as a claim for "wrongful life." See, *e.g.*, *Robak* v. *United States*, 658 F.2d 471, 474 n.3 (7th Cir. 1981); *Phillips* v. *United States*, 508 F. Supp. 537, 538 n.1 (D.S.C. 1980).

[2]"E.R." refers to the Excerpts of Record filed in the court of appeals.

explained, "the fact that [petitioner] was not on active duty at the time of the injury does not foreclose application of the *Feres* doctrine, nor does it matter that [petitioner] has an independent cause of action under state tort law. * * * [O]ur inquiry [must be directed] to the manner in which the policies underlying *Feres* are affected—specifically the impact on military discipline—rather than to the status of the claimant." *Id.* at A6. Because the treatment accorded to petitioner "as a fetus in his mother's body" was "inherently inseparable from" the treatment of his mother while she was on active duty, petitioner's "allegations of negligence * * * focus[ed] entirely on the medical treatment that Air Force physicians gave his mother" while she was on active duty. *Id.* at A7-A8. Consequently, the court of appeals concluded, "[w]hether [that treatment] constitute[d] negligence with respect to [petitioner] cannot be determined without requiring the court to second-guess military judgment in a manner inconsistent with the concern for military discipline that underlies the *Feres* doctrine." *Id.* at A8.

2. The court of appeals was plainly correct in concluding that *Feres* bars petitioner's claim. As the court recognized, the principal basis of the *Feres* doctrine is " '[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of [intra-military tort] suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for * * * negligent acts committed in the course of military duty * * *.' " *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 671-672 (1977), quoting *United States* v. *Brown*, 348 U.S. 110, 112 (1954); see 431 U.S. at 676 (Marshall, J., dissenting); *United States* v. *Muniz*, 374 U.S. 150, 162 (1963); *Hunt* v. *United States*, 636 F.2d 580, 599 (D.C. Cir. 1980). If a claim requires an inquiry into decisions made or actions taken incident to the service of a soldier, "the effect of the action upon military discipline is identical whether the suit

is brought by the soldier directly or by a third party." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673.

The actions of which petitioner complains were all taken by Air Force personnel in connection with either an immunization program for basic recruits or the medical care of a servicewoman during military training. As petitioner concedes (Pet. 14), his mother would be barred from maintaining a suit based on those actions; allowing such a suit would open decisions about the training and care of military recruits to post hoc examination by the courts, with the risk of interfering with military order and discipline. But petitioner's suit would require precisely the same inquiry as a suit by petitioner's mother based on the same events. "The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would * * * require members of the Armed Services to testify in court as to each other's decisions and actions." *Stencel Aero Engineering Corp.* v. *United States, supra,* 431 U.S. at 673.

The other courts of appeals that have considered similar claims by the children of servicemen have reached the same result. In *Monaco* v. *United States,* 661 F.2d 129 (9th Cir. 1981), cert. denied, 456 U.S. 989 (1982), for example, the plaintiff claimed that she was born with a birth defect because the government negligently exposed her father to radiation while he was on active duty; the court of appeals ruled that her claim was barred by *Feres* because it required a court to "examine the Government's activity in relation to military personnel on active duty." 661 F.2d at 134.[3]

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[3]Our memorandum in opposition in *Monaco* discusses the issue raised by petitioner's claim, and we have sent a copy of that memorandum to counsel for petitioner.

See *Lombard* v. *United States*, 690 F.2d 215, 223-226 (D.C. Cir. 1982), petition for cert. pending, No. 82-1443 (filed Feb. 25, 1983). See also *Laswell* v. *Brown*, 683 F.2d 261, 269 (8th Cir. 1982), cert. denied, No. 82-5574 (Feb. 22, 1983); *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 781 (E.D.N.Y. 1980).

3. Petitioner attempts to distinguish his claim from others held barred under *Feres* by asserting that his "cause of action is *not* dependent on establishing either that his mother was injured or that the government was negligent in the medical care and treatment of his mother." Pet. 19 (emphasis in original). Instead, petitioner contends, his "injuries were in no way derivative of any injury to his mother, but rather were the direct result of the negligence of Air Force medical personnel toward him. In fact—the critical fact—the mother * * * was not injured." *Ibid.* But the applicability of *Feres* plainly cannot depend on whether an action that affects a fetus in a pregnant woman is characterized as an injury to the woman, an injury to the child, or an injury to the child derived from an injury to the woman; such characterizations are irrelevant to the impact of an action on military discipline.[4] Every action challenged by petitioner was taken by Air Force doctors dealing with a servicewoman on active duty; petitioner does not show how the threat to military discipline presented by his claim differs in any way from the threat that would be posed if petitioner's mother filed a suit for injury to herself based on

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[4]We note that, in fact, petitioner's mother might have an actionable claim under Texas law on the facts alleged in petitioner's complaint. See *Jacobs* v. *Theimer*, 519 S.W.2d 846, 849 (Tex. 1975) (parents of child born with congenital rubella syndrome after doctor failed to counsel mother on risks posed by exposure to rubella may recover medical expenses necessitated by his condition). Of course, as petitioner recognizes, this claim too would be barred by *Feres* if brought against the United States.

the same actions. Petitioner cites a number of cases in which servicemen's dependents were allowed to sue under the Federal Tort Claims Act, but as petitioner's own description of these cases shows, in each the challenged military decisions and actions related solely to the dependent, not to the serviceman. See Pet. 14-15 n.14.[5] By contrast, the lower courts have consistently held that *Feres* bars dependents' claims that are, like petitioner's, based solely on actions taken toward a serviceman incident to service. See, *e.g.*, *Johnson* v. *United States*, 631 F.2d 34, 36 (5th Cir. 1980), cert. denied, 451 U.S. 1018 (1981) (wrongful death); *De Font* v. *United States*, 453 F.2d 1239, 1240 (1st Cir.), cert. denied, 407 U.S. 910 (1972) (loss of companionship and loss of income); *Harten* v. *Coons*, 502 F.2d 1363, 1364-1365 (10th Cir. 1974) (suit for cost of raising child after negligent vasectomy performed on serviceman); *Van Sickel* v. *United States*, 285 F.2d 87, 91 (9th Cir. 1960) (wrongful death); *Harrison* v. *United States*, 479 F. Supp. 529 (D. Conn. 1979), aff'd, 622 F.2d 573 (2d Cir.), cert. denied, 449 U.S. 828 (1980) (loss of consortium); *Wisniewski* v. *United States*, 416 F. Supp. 599 (E.D. Wis. 1976) (marital disharmony).

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[5]For example, in *Grigalauskas* v. *United States*, 103 F. Supp. 543 (D. Mass. 1951), aff'd, 195 F.2d 494 (1st Cir. 1952), the claims were based on alleged malpractice towards an infant born to the wife of a serviceman. Obviously, the medical treatment of the infant after birth did not involve any decision by the military toward the infant's father. See also *Costley* v. *United States*, 181 F.2d 723 (5th Cir. 1950) (improper administration of anesthetic to serviceman's wife); *Messer* v. *United States*, 95 F. Supp. 512 (N.D. Fla. 1951) (malpractice on serviceman's wife); *Herring* v. *United States*, 98 F. Supp. 69 (D. Colo. 1951) (malpractice on serviceman's wife); *Steele* v. *United States*, 463 F. Supp. 321 (D. Alaska 1978) (malpractice on serviceman's son); *Sigler* v. *LeVan*, 485 F. Supp. 185 (D. Md. 1980) (illegal search and seizure of home).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1983

DOJ-1983-03